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## Judicial and Regulatory Decisions

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# JUDICIAL AND REGULATORY DECISIONS

## COMMERCIAL AIR CARRIER LIABILITY AND THE THEORIES OF TORT LAW

**B**ECAUSE of the air industry's excellent safety program, the percentage of accidents in flight has decreased. Nevertheless, the expansion of air service has resulted in a greater number of accidents, and in increasing litigation. Hence, the entire problem of the liability of aircraft owners and operators to persons and property on the ground on the one hand, and to their passengers on the other hand, is receiving renewed attention. It is the purpose of this paper to examine the various theories of tort law which the courts apply in this situation.

### PERSONS AND PROPERTY UPON THE GROUND

Two standards have been applied to the problem of liability to the owner or occupier of property on the ground for injury resulting from a crash. The majority of the courts follow the rule of absolute liability under which the person injured or damaged is allowed to recover regardless of any questions of negligence except his own, but with the defenses of "Act of God" or "Vis Major" available.<sup>1</sup> However, other courts base the imposition of liability on the ordinary rules of negligence and proximate cause applicable to torts on land.<sup>2</sup>

#### *Absolute Liability*

Imposition of absolute liability has led the courts to utilize several tort doctrines: (1) Trespass, (2) Nuisance and (3) Dangerous Activity.

*Trespass*: If the court feels that the imposition of strict liability in the instance of a crashing airplane accomplishes justice, then it has at hand abundant legal analogies from the trespass field as convincing and controlling authorities, regardless of the absence of negligence.

The fact that the law of trespass was clearly molded long before air travel became an accepted means of transportation probably explains much of the confusion which appears with respect to its application to aircraft cases. If the maxim, *cujus est solum ejus est usque ad coelum*<sup>3</sup> were strictly adhered to air service would be drastically limited since it would be impossible to make a flight without committing a great number of trespasses. The American Law Institute has taken the position that "any flight above land . . . is a technical trespass" but that such trespass is privileged "so long as it is performed at a reasonable height."<sup>4</sup> Apparently it is well settled that there can be no liability in the absence of fault for flights of aircraft over a man's land as long as no actual damages have been caused.<sup>5</sup> One reason for the development of this idea is the necessity of airport development. The courts have recognized the right of pilots to fly low over private property when approaching an airport.<sup>6</sup> However, strict liability ensues for

<sup>1</sup> *Rochester Gas and Electric Corp. v. Dunlop*, 266 N.Y. Supp. 469, 148 Misc. 849 (1933); RESTATEMENT, TORTS §520, comment b (1934). For a general statement of the Absolute Liability Doctrine in the absence of fault see PROSSER, TORTS §56 (1941). Also see UNIFORM AERONAUTIC ACT II, UNIFORM LAWS ANN. 5 (1938). (Adopted in twenty states).

<sup>2</sup> *Kadyzak v. O'Brien*, 1941 U.S. AvR. 8 (W.D.Pa. 1941); *Sollak v. State of New York*, (1929 U.S. AvR. 42 (N.Y. Ct. Cl. 1927)).

<sup>3</sup> This latin phrase is literally taken to mean that a man owns the air space above his land to an indefinite height.

<sup>4</sup> RESTATEMENT, TORTS §150, 165 and 194 (1934); *Smith v. New England Aircraft Corp.*, 270 Mass. 511, 170 N.E. 385 (1930); UNIFORM AERONAUTIC ACT II, UNIFORM LAWS ANN. §3 and 4 (1938).

<sup>5</sup> *Smith v. New England Aircraft Corp.*, *supra* note 4; *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

<sup>6</sup> *Smith v. New England Aircraft Corp.*, *supra* note 4.

any damage caused by physical contact. In *Rochester Gas and Electric Co. v. Dunlop*<sup>7</sup> the court expressed disapproval of the literal application of the *ad coelum* maxim but held that an aviator was liable in trespass for damage when his plane crashed into the transmission tower of the plaintiff, although there had been no negligence. Further, the court stated that such trespass was not excusable as an accident because the risk that even a properly equipped and well handled plane may damage private property must be borne by one who takes the machine aloft.<sup>8</sup>

*Nuisance*: The nuisance doctrine is never invoked in the case of a crashing plane resulting in damage. Its significance lies in the field of injunctions against flight either for disturbance of enjoyment or impairment of the value of land.<sup>9</sup> Therefore, this paper will not deal with the nuisance doctrine.

*Dangerous Activity*: The courts have justified the imposition of strict liability on the basis of the one-sidedness of the risk of the activity. The aviator is a continual danger to the land owner, while the latter does not usually endanger the activity of the former.<sup>10</sup> Strict liability should be administered without reference to the youth of the industry. Such liability has been imposed in Europe without disastrous results.<sup>11</sup> Since its adoption by the Rome convention this standard also applies to carriers of a ratifying country when a crash occurs in the territory of another ratifying nation.<sup>12</sup>

Of great import is the fact that most of the benefits of aeronautics (as between owner and third person on the ground) accrue directly to those engaged in the industry. With this apparent one-sidedness of benefits there should be no question as to who ought to pay the bills for injury or damage.<sup>13</sup> The purchase of adequate insurance, whose costs will ultimately be borne by passengers and shippers who utilize the aircraft service, is the answer to the owner's increased cost of operation resulting from the imposition of

<sup>7</sup> *Rochester Gas and Electric Co. v. Dunlop*, *supra* note 1.

<sup>8</sup> *Strother v. Pacific Gas and Electric Co.*, 94 Cal.2d 858, 211 P.2d 624 (1949); *Capital Airways Inc. v. Indianapolis Power and Light Co.*, 215 Ind. 462, 18 N.E.2d 776 (1939); RESTATEMENT, TORTS §150, 165 and 194 (1934).

<sup>9</sup> *Sweetland v. Curtiss Airports Corp.*, 55 F.2d 201 (1932) U.S. Av.R. 21 (6th Cir. 1931), modifying 41 F.2d 929 (1930) (Airplanes from nearby airport were flying over tract of land on which Sweetland and Associates had and were constructing residences. They sought injunction because the construction of a proposed airport plus the planes flying overhead would depreciate the value of their property. Held defendants have right to build airport, but not where it interferes with enjoyment of property. Here the noise and lights would prevent normal enjoyment.)

<sup>10</sup> Vold, West and Wolf, *Aircraft Operator's Liability for Passenger Injury and Ground Damage*, 13 NEB. L. BULL. 373 at 381 (1935): "The ground occupier is constantly in danger of the airplane's crash; the only one whose activity can possibly get out of hand in this situation is the operator of the aircraft. When the inherent susceptibility of the plane to elemental disturbances or to mechanical imperfections causes it to obey the law of gravity, damage to persons or property on the ground is inevitable. In view of the completely one-sided situation existing from the moment the aeronaut leaves the ground, the case is an *A Fortiori* one for the imposition of strict liability."

<sup>11</sup> Bohlen, F. H., *Aviation Under the Common Law*, 48 HARV. L. REV. 216 (1934).

<sup>12</sup> The official English text of the Convention On Damage Caused By Foreign Aircraft To Third Parties On The Surface, signed at Rome on October 7, 1952, 19 J. AIR L. 447 ff. (1953).

<sup>13</sup> Vold, West and Wolf, *supra* note 10, at 382: "The aeronaut flies over the land of the ground owner without permission from him. He is not in the position of the railroad which may have paid adjoining landowners an exorbitant price for the use of the right of way. He is not in the position of the motorist who uses the road constructed for the benefit of the property owner as well as the motorist and which adds materially to the value of the adjoining property." The aircraft owner, in effect, has his cake and eats it also. He receives all the benefits and gives nothing in exchange.

strict liability. In the end, those who demand and benefit from the speedier transportation pay for any loss occasioned by its use.<sup>14</sup>

### Negligence

The justification for placing aircraft in the category of extra hazardous instrumentalities with the resulting imposition of strict liability is still disputed. The following arguments are made for the application of the normal rules applicable to torts on land. First, airplanes are not to be branded as extra hazardous instrumentalities.<sup>15</sup> Second, the inability of a person on the ground to escape injury from a falling airplane differs only in degree from the inability of a pedestrian to avoid injury from an uncontrolled automobile.<sup>16</sup>

It seems, however, that the great weight of authority is against these arguments. The Restatement of Torts takes the position that aviation in its present state of development is ultra-hazardous because even the best constructed and maintained airplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained and operated, may crash "to the injury of persons, structures and chattels on the land over which the flight is made."<sup>17</sup> Moreover, the fact that airplane crashes can and do occur in such remote areas presents the problem of accessibility and availability of fresh evidence to prove negligence.<sup>18</sup>

Recently, the absolute liability theory has been challenged by those who would substitute the doctrine of *res ipsa loquitur*.<sup>19</sup> The challengers insist that the application of this theory to these cases eliminates the need for the strict liability theory. They argue that a resort to the doctrine of *res ipsa loquitur* eliminates the objection that failure to invoke the rule of absolute liability burdens the injured party with the practical impossibility of establishing the cause of the accident. It is further argued that the adoption of *res ipsa* will allow the defendant an opportunity to present an explanation. Yet, in the cases where *res ipsa loquitur* has been applied, the airline companies contest its application on the ground that the crash of aircraft is not so unusual as to raise a presumption of negligence, thereby demonstrating the advisability of strict liability.

Accordingly, the Restatement of Torts bases its position as to liability on the extra-hazardous character of aviation.<sup>20</sup> It seems apparent that aviation presents a unique situation from the standpoint of one-sidedness or risk, ability to minimize risk, one-sidedness of benefits, and the ability to distribute the loss with the least social hardship. It should be the function of the courts and legislatures to apportion reasonably and equitably the loss which at the outset falls upon the person (ground occupier) least able to pay that loss, and who stands in the relation of the innocent victim of injury occasioned by the activity of another for whose benefit the activity is carried on. Under these circumstances, it seems necessary to continue to apply the absolute liability theory rather than the negligence theory.

<sup>14</sup> COHEN, LAW AND THE SOCIAL ORDER (1933); Report 341 of the Standing Committee on Aeronautical Law of the A.B.A. (1952):

1. Bill H.R. 7270 introduced into House of Representatives which would amend the C.A. Act so as to provide for assurance as to financial responsibility of aircraft owners. No action has as yet been taken on H.R. 7270.

2. Model Act (concerning financial responsibility for injury to aircraft) —completed and awaiting final draft after criticism from those concerned.

<sup>15</sup> Herrick, Olsen and Interstate Air Service, Inc. v. Curtiss Flying Service, Inc. and Barnes (1932), U.S. AvR. 110.

<sup>16</sup> Goldin, *Res Ipsa Loquitur in Aviation Law*, 18 SO. CALIF. L. REV. 123 (1945).

<sup>17</sup> RESTATEMENT, TORTS §165, comment c, illustration 8 (1934); Vold, West and Wolf, *supra* note 10; Rochester Gas and Electric v. Dunlop, *supra* note 1.

<sup>18</sup> Hassman v. Pacific Alaska Air Express, 100 F. Supp. 1 (D. Alaska 1952).

<sup>19</sup> Goldin, *supra* note 16, at 127.

<sup>20</sup> RESTATEMENT, TORTS §165, comment c, illustration 8 (1934).

## PASSENGERS

The law as to liability of aircraft owners to their passengers is fairly well settled and appears to be satisfactory. Four factors are involved in defining the liability of the aircraft owner to his passengers injured during flight: First, determination of the carrier's classification as a common carrier; second, the degree of care due passengers; third, the burden of proof in accidents; and, fourth, risk that the passengers assume.

*Determination of Carrier's Classification as a Common Carrier:* A discussion of the liability of private carriers will not be considered here because private plane crashes result in little of the litigation involved in this section. It is, however, appropriate to note that liability of the private aircraft owner is determined in substantially the same manner as that of an owner of an automobile in which there is a guest, in that the owner's degree of care is not as great and more care is required by the passenger.

Rejected as untenable is the contention that the novelty of the airplane or the youth of the industry should exclude it from the category of common carriers even if it holds itself out to serve the public for hire.<sup>21</sup> It is quite clear that the manner in which aircraft is used determines whether the operators are to be classified as common carriers or carriers of the private classification.

The status of an air carrier as a common carrier is tested by the same criteria as are applied to trains, boats and buses, etc. In *Casteel v. American Airways, Inc.*,<sup>22</sup> the court applied the general definition of a common carrier in testing the status of an operator of an aircraft—that of the holding out to serve the general public for hire up to the limit of its facilities with only the well recognized reservations with respect to capacity and extent of service. Likewise, when the airplane companies solicit the patronage of the traveling public, advertise their services, schedules and routes, announce rates of fares and otherwise call the attention of the public to their services and charges they have been held by the courts to be common carriers.<sup>23</sup>

Fixed rates and schedules, however, are not a necessary criteria of common carrier status.<sup>24</sup> The courts have also held that the operation of an airplane for sight-seeing<sup>25</sup> and circular service (returning to the point of departure without landing en route)<sup>26</sup> places the operator in the common carrier class with consequent liability for negligence. An operator of air transportation may refuse prospective passengers who are objectionable because of improper conduct, drunkenness or noisiness<sup>27</sup> or because of sick-

<sup>21</sup> *Casteel v. American Airways, Inc.*, 261 Ky. 818, 88 S.W.2d 976 (1935); *Curtiss-Wright Flying Service v. Glose*, 66 F.2d 710 (1933), *cert. denied*, 290 U.S. 696 (1933); *Smith v. O'Donnell*, 189 Cal. 321, 5 P.2d 690 (1931), *aff'd.*, 215 Cal. 714, 12 P.2d (1932); *North American Accident Insurance Co. v. Pitts*, 213 Ala. 102, 104 So. 21 (1925); *Harriman, Carriage of Passengers by Air*, 1 J. AIR L. 33 (1930).

<sup>22</sup> 261 Ky. 818, 88 S.W.2d 976 (1935).

<sup>23</sup> *Herrick, Olsen and Interstate Air Service, Inc. v. Curtiss Flying Service, Inc. and Barnes*, *supra* note 15.

<sup>24</sup> *McCusker v. Curtiss-Wright Flying Service*, 269 Ill. App. 502, (1933) U.S. AvR. 105. (Where airplane operating company offered to transport passengers to any destination, but did not operate over fixed routes or upon set schedules and based its rates not upon a point to point basis but upon a mileage basis. Held liable as a common carrier for the death of a passenger resulting from the negligent operation of the aircraft.)

<sup>25</sup> *Ziser v. Colonial Western Airways, Inc.*, 10 N.J. Misc. 1118, 162 Atl. 591 (1933).

<sup>26</sup> *Smith v. O'Donnell*, 5 P.2d 690, *aff'd.*, 215 Cal. 714, 12 P.2d 933 (1932), (1932) U.S. Av. R. 145.

<sup>27</sup> *Ziser v. Colonial Western Airways*, *supra* note 25; *State of Maryland ex rel. Beall v. McCleod*, (1932) U.S. Av. R. 94.

ness<sup>28</sup> or weather conditions<sup>29</sup> without altering its status from that of a common carrier to that of a private carrier. On the other hand, the Illinois courts have held that an operator of a flight service who sets a minimum and maximum on the number of passengers carried, who worked at his own pleasure and who accepted only white passengers, was not a common carrier, but rather that he fell under the classification of a private carrier.<sup>30</sup>

*The Degree of Care Due Passengers:* The air common carrier is charged with the highest degree of care in the safeguarding of its passengers, consistent with the practical operation of the plane.<sup>31</sup> However, while this statement is the generally accepted rule, the courts have declined to go one step further and have held that common carriers are not required "to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils."<sup>32</sup> Thus, in the absence of negligence during a crash in a fog an airline company was held not liable and the passenger was held to have assumed "all the usual and ordinary perils incident to airplane travel that exist over and above the dangers against which the common carrier is under a legal responsibility to guard."<sup>33</sup> Pilots are agents of a common carrier and as such are required to guard against predictable conditions that may or do occur. Pilots are not charged with responsibility if accidents are caused by gusts of wind, sudden snow squalls, fogs, rain or similar unforeseen conditions, unless the pilot has been negligent in assuming that such conditions were not to be encountered.<sup>34</sup> Perhaps, the best summation of the degree of care required of the common carrier is found in the trial court's instructions to the jury in *Seaman v. Curtiss Flying Service, Inc.*:<sup>35</sup>

"In an airplane accident the limitation of responsibility may be said to consist of a plane in good mechanical condition, handled by a careful pilot, maneuvered in a careful way under conditions that, so far as can be foreseen, are normal, or such as may be foreseen and overcome by the use of ordinary skill, such as unfavorable weather conditions so that the ordinary pilot could observe them as such."

*The Burden of Proof in Accidents:* The law requires the party alleging the existence of a fact as the basis or reason for the accident to bear the burden of establishing it by proof. The basis of the plaintiff's cause of action is the carrier's (defendant's) negligence and the burden of proving that negligence and the causal relationship of the negligence to the injury rests upon the plaintiff.<sup>36</sup>

An exception to this general rule is the doctrine of *res ipsa loquitur*:

"Whenever a thing which produced an injury is shown to have been under the exclusive control and management of the defendant,

<sup>28</sup> *Casteel v. American Airways, Inc.*, *supra* note 21.

<sup>29</sup> *Law v. Transcontinental Air Transport, Inc.*, (E.D.Pa. 1931) (not officially reported).

<sup>30</sup> *Bird, Adm. v. Lauer*, 272 Ill. App. 522 (1933), (1934) U.S. Av. R. 188.

<sup>31</sup> See trial court's instructions in *Foot v. Northwest Airways, Inc.*, (1931) U.S. Av. R. 66; *McCusker v. Curtiss-Wright Flying Service, Inc.*, 269 Ill. App. 502 (1933); *Wilson v. Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N.E. 212 (1932); *Law v. Transcontinental Air Transport, Inc.*, *supra* note 29.

<sup>32</sup> *Allison, Adm. v. Standard Air Lines, Inc.*, (1930) U.S. Av. R. 292, (S.D. Cal. 1930), *aff'd.* 65 F.2d 668 (9th Cir. 1933).

<sup>33</sup> *Allison, Adm. v. Standard Air Lines, Inc.*, *supra* note 32.

<sup>34</sup> See trial court's instructions in *Law v. Transcontinental Air Transport*, *supra* note 29.

<sup>35</sup> (1929) U.S. Av. R. 48, *rev'd. on other grounds*, 231 App. Div. 837, 247 N.Y.Supp. 251 (1931).

<sup>36</sup> *Stoll v. Curtiss Flying Service* (1930) U.S. Av. R. 148, *aff'd.* without opinion, 236 App. Div. 664, 257 N.Y.Supp. 1010 (1932); *Allison, Adm. v. Standard Airlines, Inc.*, *supra* note 32.

the occurrence is such as in the ordinary course of events does not happen if due care had been exercised and in the absence of a showing of contributory negligence, the fact of the injury itself will be deemed to afford sufficient evidence to support a recovery by the plaintiff, in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. . . ."<sup>37</sup>

The presumption of negligence is, of course, a rebuttable presumption.<sup>38</sup> It purports merely that the plaintiff has made out a prima facie case which entitles him to a favorable finding unless the defendant introduces evidence to meet and offset its effect. Where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged in and the doctrine of *res ipsa loquitur* has no application.<sup>39</sup> The rule is applied only where the direct cause of accident was within the sole control of the airline or its agents.<sup>40</sup> The doctrine does not apply if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all.<sup>41</sup> But, it has been held that where an accident to a plane occurs and there is no evidence as to what took place, if the accident cannot reasonably be accounted for except on the basis of negligence, the defendant must present an explanation consistent with the exercise of due care on his part.<sup>42</sup> The doctrine has a somewhat limited application, making it a last resort for the relief of injured persons where specific acts of negligence are incapable of being alleged and proved by the ordinary methods.<sup>43</sup>

*Risk That the Passenger Assumes:* Like the passenger of any method of transportation, the person who travels by air assumes all the usual perils incident to this mode of travel.<sup>44</sup> Passengers assume the risk involved in a sudden storm, the dangers incident to navigation through the storms and landings—provided there has been no negligence on the part of the carrier.<sup>45</sup> However, common carriers cannot provide in advance for negating or lessening their liability for loss or damage suffered by passengers as a consequence of negligent acts of the carrier and its servants by stipulation and statements on and in their tickets and contracts denying their status as common carriers, limiting their liability, or precluding recovery.<sup>46</sup>

### CONCLUSION

It seems clear that a definite distinction must be drawn between the third party cases (damage or injury to property or persons on the ground) and the passenger cases. The completely one-sided situation existing from the

<sup>37</sup> 20 R.C.L. 185 at 188; Fike, *Air Transport Protection*, 8 AIR L. REV. 316 (1937).

<sup>38</sup> McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55 (1951). The author points out that *res ipsa loquitur* has found its way into 24 aviation cases for establishing passenger fatality claims and 22 have been decided by the jury in favor of the airlines.

<sup>39</sup> *Supra* note 31.

<sup>40</sup> *Wilson v. Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N.E. 212 (1932).

<sup>41</sup> *Rainger v. American Airlines, Inc.*, (1943) U.S. Av. Rep. 122; *Goodheart v. American Airlines, Inc.*, (App. Div. 2d Dept., not officially reported) (1936) U.S. Av. Rep. 177; *Wilson v. Colonial Air Transport, Inc.*, *supra* note 40; *Smith v. O'Donnell*, 215 Cal. 714, 12 P.2d 933 (1932), (1932) U.S. Av. Rep. 145; *Seaman v. Curtiss Flying Service, Inc.* (1931) U.S. Av. Rep. 299.

<sup>42</sup> *Goodheart v. American Airlines, Inc.*, *supra* note 41.

<sup>43</sup> For exhaustive discussions of the doctrine see Goldin, *Res Ipsa Loquitur in Aviation Law*, *supra* note 16; McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, *supra* note 38.

<sup>44</sup> See trial court's instructions in *Allison, Adm. v. Standard Air Lines, Inc.*, *supra* note 32; *Wilson v. Colonial Air Transport, Inc.*, *supra* note 40.

<sup>45</sup> *Law v. Transcontinental Air Transport, Inc.*, *supra* note 29.

<sup>46</sup> *Law v. Transcontinental Air Transport, Inc.*, *supra* note 29; *Conklin v. Canadian Colonial Airways, Inc.*, 266 N.Y. 244, 194 N.E. 692 (1934).

time the aeronaut leaves the ground compels the application of the absolute liability theory in the former case, while the benefits that accrue to the passengers (in savings of time, comfort, etc.) coupled with the facts of passenger insurance and assumption of risk take the latter case out of the absolute liability category. Thus, in the passenger cases the practice has been to apply to air accidents the rules of negligence and proximate cause generally applicable to torts on land.

### ADMINISTRATIVE CURTAILMENT OF AIRLINE OPERATION

THE Civil Aeronautics Board is assigned the duty of developing the air route patterns so that adequate air transportation is provided for the country without lessening the economic stability of any of the airlines.<sup>1</sup> It is guided by the Civil Aeronautics Act which was passed in an attempt to achieve that goal.<sup>2</sup>

In carrying out its function, the Board may have to restrict one carrier's operating authority to promote the economic stability of other carriers pursuant to the policies of the Act. Such control, however, should be carried out in a manner that will allow carriers to plan their future conduct so that any progress they make will not be destroyed. What, then, are the methods which the Board may use to curtail? Are there limits on these controls? Under what circumstances may the Board act?

Possible answers to these questions have been suggested by three recent cases. *Western Airlines v. Civil Aeronautics Board*<sup>3</sup> attempted to define the statutory power to suspend and revoke which has been granted to the Board. *Southwest Airlines v. Civil Aeronautics Board*<sup>4</sup> illustrated the Board's use of its powers in rescinding an airline operation grant before the effective date for certification, while *American Air Transport v. Civil Aeronautics Board*<sup>5</sup> presented the problem of the Board's attempt to use the rule making procedures to reduce the operation authority of an irregular carrier.

<sup>1</sup> 52 STAT. 980 (1938), 49 U.S.C. §402 (Supp. 1946):

"Declaration of Policy

Sec. 2. In the exercise and performance of its powers and duties . . . the Authority shall consider the following among other things, as being in the public interest and in accordance with the public convenience and necessity.

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.

(b) The regulation of air transport in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic condition in such transportation and to improve the relations between and coordinate transportation by, air carriers.

(c) The promotion of adequate economical and efficient service by air carriers at reasonable charge, without unjust discrimination, undue preference or advantages, or unfair or destructive practices.

(d) Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.

(e) The regulation of air commerce in such manner as to best promote its development in safety and

(f) The encouragement and development of Civil Aeronautics." (Italics added.)

<sup>2</sup> See the legislative history to this effect in 83 CONG. REC. 6405, 6407, 6507 (1938).

<sup>3</sup> 196 F.2d 933 (9th Cir. 1952).

<sup>4</sup> 196 F.2d 937 (9th Cir. 1952).

<sup>5</sup> 98 F.Supp. 660 (D.D.C. 1951). For the circuit court opinion see 2 CCH AVIATION LAW REP. 17,933 (1952); cert. denied 344 U.S. 4 (1953). It has since been remanded to the district court.



*Suspend, Revoke, Alter and Amend*

The Board's authority to curtail a certified carrier's operation is expressly provided for by statute.<sup>6</sup> A question as to the limits of this statutory power were raised where a broad interpretation of the suspension powers of the Board was pressed upon the Court of Appeals for the Ninth Circuit in *Western Airlines v. Civil Aeronautics Board*.<sup>7</sup> Western contested the Board's authority in suspending its permanent license to El Centro, California and Yuma, Arizona, and substituting Bonanza Airlines, a temporarily certified carrier, in its place. The Board was of the opinion that more adequate service would be provided by Bonanza, a feeder airline, than by Western, a trunk line operation.<sup>8</sup> According to the statutory language, the Board may "suspend any such certificate . . . if the public convenience and necessity so require."<sup>9</sup> On the other hand, the Board may revoke only "for intentional failure to comply with any provision . . . order, rule or regulation."<sup>10</sup> Thus a revocation is only possible for specific misconduct, while suspension is possible when the "public convenience and necessity so require." The validity of the Board's action depends upon whether a suspension or revocation in fact has occurred, and if a suspension, whether the public convenience and necessity require this action.

To determine whether a suspension or a revocation was in order, one must view the factual circumstances, bearing in mind that a revocation is intended to be permanent in nature, while a suspension is temporary.<sup>11</sup> In the past, the Board has only suspended when permanent changes were not contemplated.<sup>12</sup> In the Western case it was argued that the Board's action was intended to be permanent, since there had only been one previous case where an extension of a temporary certificate had been denied.<sup>13</sup> Further, the Board's references to the "long-run" policy of seeking better service in the area<sup>14</sup> indicated that Bonanza's temporary certificate was issued with the intention that it be renewed indefinitely.<sup>15</sup> These factors, it was argued,

<sup>6</sup> 52 STAT. 987(h) (1938), 49 U.S.C. §481(h) (Supp. 1946): "The Authority . . . after notice and hearing, may alter, amend, modify or suspend any such certificate . . . if the public convenience and necessity so require, or may revoke . . . for intentional failure to comply with any provision . . . order, rule or regulation issued hereunder . . . Provided, that no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time . . . with an order of the Authority commanding obedience. . . ."

<sup>7</sup> *Supra* note 3.

<sup>8</sup> Reopened Additional California-Nevada Service Case, Order Serial No. E-6040 (Jan. 17, 1952). The Board held that they wished to substitute a local carrier in Western's place as Western had shown an unwillingness to supply a truly local type service to the area as service to these points were of secondary importance to them, and that the Board's policies favored local carriers over trunk line operations. A trunk line provides cross-country service, while a feeder airline is one characterized by local type operation.

<sup>9</sup> *Pan American-Grace Airways v. CAB*, 178 F.2d 34 (D.C.Cir. 1948); *All-American Suspension Case* 10 C.A.B. 24 (1949); *North Central Route Investigation Case*, Order Serial No. E-5952 (Dec. 13, 1951); *Pioneer Certificate Renewal Case* Order Serial No. E-4585 (Sept. 1, 1950); *Wisconsin Central Renewal Case* Order Serial No. E-5951 (Dec. 13, 1951).

<sup>10</sup> See note 6 *Supra*.

<sup>11</sup> See WEBSTER, *NEW INTERNATIONAL DICTIONARY* 2541 (2d Ed. 1945); *BLACK'S DICTIONARY OF LAW* 1129 (2d Ed. 1910).

<sup>12</sup> *Black, Suspension of Certificates of Convenience and Necessity Under the Civil Aeronautics Act of 1938*, 14 J. AIR L. 512, 514-15, (1947): "... the fundamental distinction between suspend and revoke is that suspend implies temporariness, whereas revoke connotes permanence."

<sup>13</sup> *Florida Airways Certificate Extension*, 10 C.A.B. 93 (1949).

<sup>14</sup> Reopened Additional California-Nevada Service Case, Order Serial No. E-6040 (Jan. 17, 1952). "These are factors which support our conclusion that the transportation needs of El Centro and Yuma will in the long run be better served by a local carrier than by a trunk."

<sup>15</sup> Brief for Respondent, p. 19, *Western Airlines v. CAB*, 196 F.2d 933 (9th Cir. 1952).

coupled with the Board's intensive investigation of the feeder carrier program in that area, indicated that permanent changes in the nature of a revocation were contemplated even though the Board's order was clothed in the language of suspension. Thus, since the statutory procedures for revocation were not followed the order should be declared invalid.<sup>16</sup>

The view which was accepted by the court, however, was that the Board was merely suspending Western's certificate.<sup>17</sup> This conclusion was based on the fact that by the terms of the order itself, it was to expire on December 19, 1952.<sup>18</sup> The court refused to base its decisions on what might hypothetically occur, but rather, said that future decisions would be made when the future events occur. Since the order was temporary, suspension procedures were proper. Western, under this view may eventually resume operation, since a suspension "connotes the continued legal existence of the certificate right and the possibility that the public convenience and necessity factor, giving rise to the suspension may come to an end so that service can be restored."<sup>19</sup>

The court, in interpreting the limits of "public convenience and necessity" held that the Board could validly substitute one carrier for another in carrying out their suspension powers. The court thus sustained the Board's position by holding that any other interpretation would be an undue restriction on the Board's powers.<sup>20</sup>

What, however, will be the Board's position when the suspension period has ended? The Board has four alternatives: 1) there is the unlikely possi-

<sup>16</sup> See Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. AIR. L. 377,388 (1948): "The Act itself clearly shows that Congress intended to treat modification and revocation as two fundamentally different things; thus, it empowers the Board to modify a certificate if the public convenience and necessity so require, but it prohibits the revocation of a certificate for any reason other than intentional failure of its holder to comply with its terms or the provisions of the Act or the regulation issued by the Board thereunder."

<sup>17</sup> 196 F.2d at 934.

<sup>18</sup> Brief for Respondent, p. 16 *Western Airlines v. CAB*, 196 F.2d 933 (9th Cir. 1952). In the *All-American Suspension Case*, 10 C.A.B. 24, 34 (1949) it was indicated that even if the suspension were of indefinite duration, it would be valid.

<sup>19</sup> This broad view may be contrasted with one that would prevent suspension when it would allow one airline to replace another. This view would allow suspension to be applied only in a limited number of situations, i.e. when area no longer requires service. The proponents of this position contend that the statute as a whole requires this limited interpretation even though Sec. 401(h) [49 U.S.C. 481(h) (Supp. 1946)] uses the expression "public convenience and necessity" as a guide for the Board's action. This construction is based on the propositions that (1) Sec. 2 of the Act requires stability in operation and sound economic conditions to exist among the airlines, and if the Board had this right to shuffle the air routes, it would promote economic unrest; (2) 401(d)(2) of the Act [49 U.S.C. §481(e)(2) (Supp. 1946)] would be a nullity if the Board had this right to suspend as there would be no need for temporary certificates; (3) 401(e)(1) [49 U.S.C. §481(e)(1) (Supp. 1946)], the "Grandfather Clause," would be of no consequence as this suspension right would allow the Board to change the route which would be contrary to the fairness and stability which the Act requires.

<sup>20</sup> A comparable application of the public convenience and necessity standard was shown in the *All-American Suspension Case*, 10 C.A.B. 24, 27 (1949): "If the public convenience and necessity do not require a particular operation, the service or the certificate could be suspended without fault of the carrier, subject to the service being reinstated by that carrier, or the suspension of the certificate being terminated, if and when the situation changed so as to indicate that the public convenience and necessity again required service."

Further judicial affirmance of the Board's position in allowing a suspension of a carrier's operation so that another will be given greater economic security is shown in *United Airlines v. C.A.B.*, 198 F.2d 100 (7 Cir. 1952). The Seventh Circuit approved the Board's action in the *Southwest Renewal United Suspension Case Serial No. E-6063* (Jan. 29, 1952) in suspending United's operation in order to allow Southwest, a feeder route, to be free from competition.

bility that the area might support another carrier, in which case Western and Bonanza could operate concurrently; 2) they could allow Western to continue operation under its permanent certificate if they deem that Bonanza had not done an adequate job; 3) they may attempt to extend the suspension period and allow Bonanza to continue to operate under a temporary certificate (Western, however, could allege that this is more concrete evidence that a suspension of permanent nature is contemplated and that the procedures necessary for revocation should be followed; faced with this added circumstances of renewal, the court may follow that interpretation); 4) they could conclude that Bonanza should be given this route as their service met the needs of the area most efficiently, whereupon they would alter, amend or modify Western's certificate.

Such permanent changes as are suggested in the fourth alternative are permissible only where they do not work a basic change in the character of the route.<sup>21</sup> Assuming then that the Board was altering or amending the route, the only remaining issue would be whether in fact the order caused a substantial change in Western's route. If no substantial change in Western's overall route structure occurred, the order would be valid as the statutory requirements for "alter, amending or modifying" could be met without finding a direct violation of the Act. If there were a substantial change, the amendment would be impossible. Revocation procedures would require Western's restoration, as the airline is given opportunity to comply after a violation of the Act.

#### *Rescission*

An illustration of Board action independent of a statutory authority is shown in the Southwest case.<sup>22</sup> The Civil Aeronautics Board had given a temporary certificate to Southwest Airlines which would become effective at a future date.<sup>23</sup> Before the effective date, the Board reconsidered in a proper hearing<sup>24</sup> and rescinded its order.<sup>25</sup>

The issues to be resolved were whether the Board had statutory authority to rescind without a hearing and whether the rescission was based on adequate finding.

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<sup>21</sup> Whether or not the courts would consider the elimination of the Imperial Valley route a basic transformation of Western's route, should be considered in light of other decisions. It is Western's position that this is a one hundred percent change in the Imperial Valley route, a 58.09 percent change of the Los Angeles route, and 14.53 percent change of their full route 13. These changes may be compared to the attempted increase in air route as shown in the Panagra Terminal Investigation, 4 C.A.B. 670 (1944). The extension would have increased the route mileage by 1200 miles or 14 percent of the existing mileage. This would also result in an expenditure of \$800,000 in additional investments. Here it was held that the extension requested would constitute a basic transformation of the route. The length of the mileage and the additional investment were the crucial factors preventing such alteration.

In the Caribbean Area Case, 9 C.A.B. 534 (1948), Pan America's operation was eliminated in several areas which allowed Caribbean-Atlantic to have sole authority. This was held to be a valid alteration and amendment of Pan American's route as this reduction in their authority was said not to amount to a substantial change in route. Pan American would lose only 0.18 percent of their revenue derived from its Latin American division as a result of this suspension.

<sup>22</sup> Southwest Airways Company v. CAB, 196 F.2d 937 (9 Cir. 1952).

<sup>23</sup> Additional California-Nevada Service Case, Order Serial No. E-3727 (Dec. 19, 1949). Although the certificate was issued on Dec. 19, 1949, it was not to go into effect until Feb. 17, 1950.

<sup>24</sup> Petitions for reconsideration were filed by Los Angeles Airways Inc., Western Airlines and United Airlines pursuant to the Board's rules of practice. This rule, §302.37, provides that any party to a proceeding may, within 30 days after service of a final order of the Board therein, petition for rehearing, reargument or reconsideration of such order.

<sup>25</sup> Additional California-Nevada Service Case, Order Serial No. E-3975 (March 10, 1950).

In contending that the Board did not have statutory power to make a rescission one could argue that the only way this operating authority could be permanently withdrawn was through the Board's suspension or revoking authority. The basis of this theory is the idea that an immediate license right was created.<sup>26</sup> However, since there was a period during which the Board continued to have jurisdiction over their previous order by the express terms of the certificate, it would follow that the Board properly reconsidered its prior decision without giving Southwest a hearing.<sup>27</sup> By this continued jurisdiction, the Board could modify its orders until they became effective even though there is no express statute granting this right. Southwest's allegation that the rescission was legally insufficient met with failure. The court held that the rescission order itself was sufficient evidence to indicate that the Board had given proper consideration to all relevant factors leading to their decision saying that a more proper result would be obtained through a contemporaneous consideration of Western's application along with Southwest's in regards to the California-Nevada area.

### Rule Making

The previous cases have resulted from disputes arising in the Board's interpretation of their powers under adjudication procedures. Through its statutory authority to issue rules, the Board has another possible tool for airline regulation<sup>28</sup> as shown in *American Air Transport v. CAB*.

A brief history of "irregular carriers" is desirable to present a clear picture of the circumstances leading to that case.<sup>29</sup> At the time of the adoption of the Civil Aeronautics Act, it was recognized by its framers that there might be circumstances where carriers should be exempt from its provisions. Consequently, a provision was included which gave the Board permission to exempt carriers from the Act's economic provisions when it was to the public's benefit.<sup>30</sup>

Pursuant to these provisions, the Board issued exemption regulations which provided for a blanket exemption to those carriers who would operate on a "non-scheduled basis."<sup>31</sup> When these regulations were promulgated, activities under the blanket exemption were of very narrow scope and had little effect on the national air route economy.

After the war, however, with the added interest in commercial aviation generally, the irregular operations grew enormously.<sup>32</sup> Since there was no

<sup>26</sup> Brief for Appellants, pp. 33-34, *Southwest Airways v. CAB*, 196 F.2d 937 (9th Cir. 1952). "... although a carrier may not begin operations under a certificate until its effective date, nevertheless the certificate and rights under it, except the right to begin operations, are in existence from the date the certificate is issued and may only be modified, suspended, or revoked under the conditions prescribed in Sec. 401(h)."

<sup>27</sup> Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. AIR L. 377, 388 (1948). *Kansas City-Memphis-Florida Case Supplemental Opinion*, 9 C.A.B. 401, 408-09 (1948). "... we shall pursue a policy of making the certificate effective on such date as will permit reconsideration."

<sup>28</sup> 52 STAT. 984(a) (1938), 49 U.S.C. §425(a) (1946): "The Board is empowered to perform such acts . . . to make and amend such general or special rules . . . pursuant to and consistent with the provisions of the charter. . . ."

<sup>29</sup> For a discussion of this field see Hahn and Moore, *Regulation of Irregular Carriers*, 35 CORNELL L.Q., 48 (1947); Netterville, *Regulation of Irregular Air Carriers*, 16 J. AIR L. 414 (1949).

<sup>30</sup> 416(b)(1) of the Act, 52 STAT. 1004 (1938), 49 U.S.C. 496 (b)(1): "The Board . . . may . . . exempt from the requirements [of the Act] . . . if it finds that the enforcement . . . would be an undue burden on such air carrier or class . . . and is not in the public interest."

<sup>31</sup> Netterville, *The Regulation of Irregular Air Carriers: A History*, 16 J. AIR L. 414 (1949): "In 1938, the Board promulgated and adopted regulation 292.1, classifying and exempting from the certificate requirements of the Act the so-called "non-scheduled" air carriers."

<sup>32</sup> Hahn and Moore, *Regulation of Irregular Carriers*, 35 CORNELL L.Q. 48, 49 (1947). "... irregular air transportation has, like Topsy, 'just grewed.'"

requirement for a certificate of convenience and necessity, and no need for observance of the economic regulations, the tendency of newcomers to enter this area was enhanced. Even though irregular carriers were not to carry on a route type service, many of them attempted to do so.

Since the Board felt that more adequate control of the non-scheduled operators was needed, on June 10, 1947 the Board changed the exemption provisions. They established categories of irregular carriers which would be exempt from the economic regulations.<sup>33</sup> They required that these carriers obtain "Letters of Registration" from the Board and were to comply with other requirements of the Act. The Board retained control over these carriers by issuing rules giving themselves a right to revoke or suspend such "Letters of Registration."

It was this "Letter of Registration" which was issued pursuant to the statutory exemption that gave American Air Transport its right to operate as an irregular carrier.

In spite of greater Board control over the exempted airlines, flagrant abuses continued. There was evidence that the irregulars were operating in a manner which was causing substantial harm to certified operators.<sup>34</sup> To prevent these continued abuses, the Board issued a regulation which would remove the blanket exemption granted to large irregular carriers.<sup>35</sup> Application for individual exemptions were to be filed by holders of "Letters of Registration" if they wished to continue operation. Irregular operation was permissible until the individual exemption was acted upon by the Board.<sup>36</sup>

The Board's action produced an anomalous situation. Those whose individual exemption application had been granted were restricted in their operation by the terms of the exemption, while the others, whose operation had not come up for adjudication were unfettered.<sup>37</sup> To correct this situation, the Board passed the rule which is now in dispute in the American Air Transport case. The action of the Board was in effect an interim emergency measure which was calculated to place all irregular carriers on equal footing, whether or not their individual exemption had been granted.

It was American Air Transport's contention that this rule amounted to an alteration of their license which could only be accomplished through order procedures.<sup>38</sup> Since the Board followed rule making procedures, the purported rule should be invalid.

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<sup>33</sup> See ECON. REG. 291 *et seq.*

<sup>34</sup> The large irregular carriers showed a history of violating the concept of infrequent flights. The Board attempted to advise the industry in this respect. Investigation of Non-Scheduled Air Service, 6 C.A.B. 1049, 1055 (1946). Further, where flights were found to be in a frequent pattern, the court has held this to require that the carrier obtain a letter of convenience and necessity. *Civil Aeronautics Board v. Modern Air Transport*, 179 F.2d 622 (2d Cir. 1950).

<sup>35</sup> 14 FED. REG. 3546, 14 CODE FED. REGS. §291 (1949).

<sup>36</sup> To curb the evils of such competition by the irregular carriers against the certified carriers, the Board amended the blanket exemption of the large irregular carriers and allowed them to file applications for individual exemptions. Until such exemptions were handled, however, the carriers were allowed to operate. 14 FED. REG. 1879 (1949).

<sup>37</sup> 16 FED. REG. 2216 (1951): "Thus the interim authority granted by the provision of §291.16 of the Economic Regulations to large irregular carriers whose cases have not been processed is at variance with the standard terms and conditions contained in the individual exemption orders issued to carriers of essentially the same class. In order to cure this inequality and to set forth specifically the exact limitations of the operational authority conferred upon large carriers under §291.16, the Board is promulgating this regulation."

<sup>38</sup> *Ibid.* This regulation (Economic Regulation 291.27) limited the operation of "large irregular carriers" to no more than three flights a month between Chicago and Miami and a similar limitation between New York and Miami. A restriction limiting operation to no more than eight flights a month to other cities was also put into effect. This was adopted by rule making procedure and the Board allowed this to go into effect before evidentiary hearing could be had.

The District Court affirmed the Board's view in holding that the Board was in effect amending the license and did not need to follow adjudication procedures.<sup>39</sup> The Circuit Court of Appeals had three distinct views on the classification of the Board's rule.<sup>40</sup> They all agreed that if the new regulation amended the existing license it could only be accomplished by adjudication procedures. One of the judges agreed with the District Court in holding that this was a modification of the license and could only be accomplished through adjudicatory procedures. Another judge would reverse since he believed that an amendment to a regulation, under whose authority the license was issued, which defined its terms in a manner shown not to be arbitrary or capricious was valid when adopted by rule making procedures.<sup>41</sup> The third judge wanted the case remanded, holding "... (1) that the decisive question is whether the specific proscriptions of the new Regulation are or are not proper or reasonable definition of the undefined terms ('regularly or with a reasonable degree of regularity') of the original licenses and (2) that that question is a question of fact which must be determined upon factual criteria, devised from studies of actual operations of regular carriers and of irregular carriers. . . ."<sup>42</sup> The case has now been remanded to the District Court in accordance with the views of the third judge.<sup>43</sup>

The resolution of whether the Board could use its rule making powers under such circumstances is largely a matter of definition. The problem is to categorize the Board's act as a rule or a license under the Administrative Procedures Act's definitions.<sup>44</sup> The airlines' position is that the Board is amending their license (Letter of Registration) by limiting the number of flights which they may make. They believe it falls within the statutory definition of licensing as it is a "limitation, amendment, modification, or conditions of a license." The Board's action they argued, was improper as procedure for adjudication was not followed such as is required for licensing.

The Board's action, however, could possibly be construed as an interpretive rule.<sup>45</sup> To do so, one would have to say that it defines what "irregular" means: that a rule placing limitations in number of flights defines the "irregular" category. A look at the history of the irregular carriers indicates that they have persistently infringed on their certified carriers.<sup>46</sup> The Board, in order to make its stand on the irregular classification clear; formulated this rule. It was therefore an attempt by the Board to state specifically when irregular operation passed into regular. It could be considered as defining concretely what the interpretative section defined in a more general way.<sup>47</sup>

<sup>39</sup> Brief for Appellee, p. 3 *American Air Transport v. CAB*.

<sup>40</sup> 98 F. Supp. 660 (D.D.C. 1951).

<sup>41</sup> 2 CCH AVIATION LAW REP. 17,933 (1952).

<sup>42</sup> *Id.* at 17,938.

<sup>43</sup> *Ibid.*

<sup>44</sup> 5 U.S.C. §1001(c):

"RULE AND RULE MAKING—'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . . 'Rule making' means agency process for the formulation, amendment, or repeal of a rule.

"(d) ORDER AND ADJUDICATION—'Order' means the whole or any part of the final disposition . . . other than rule making but including licensing. . . . 'Adjudication' means agency process for the formulation of an order.

"(e) LICENSE AND LICENSING—. . . 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license."

<sup>45</sup> Davis, *Administrative Law* 194-200 (1951).

<sup>46</sup> 1 C.C.H. *Aviation Law Rep.* §11,469 (2d Ed. 1952).

<sup>47</sup> CAB interpretation of §291 on "irregular carriers": the Board interprets what they shall consider "irregular." Flights must be conducted in a manner so that there must be frequent, extended, and definite breaks in service. 13 FED. REG. 7769, 14 CODE FED. REG. §292.1 (1949).

The position of the third judge in the circuit court opinion is that it is a fact question whether this is a reasonable definition. On this basis, it was remanded to the district court by the circuit court when the Supreme Court refused to take jurisdiction.

A better view would be to construe it as a legislative rule. It could be argued that the rule is legislative in nature in that the Board is acting under the exemption provisions of the statute rather than amending the Letter of Registration. It is legislating as to how one can qualify for the statutory exemption and does not consider the Letter of Registration in doing so. Adjudication proceedings under the exemptions provision do not have to be followed and rule making procedure therefore, is adequate.<sup>48</sup>

Further, the rule is applicable to the entire industry and is prospective in effect.<sup>49</sup> The Board's regulation is based on policy considerations involving the entire class to which American Air Transport belongs. Such action can then be classified as quasi-legislative or rule making no matter if it results in detriment to American Air Transport and the other carriers similarly situated.<sup>50</sup>

It would be argued that this case is not comparable to one where a Letter of Registration is suspended without a hearing.<sup>51</sup> Adjudicatory hearing is necessary as the action of the Board relates to the disciplining the wrongdoing of a particular carrier. It is distinguishable from our case as the rule promulgated applies to the entire segment of the industry and not as punishment to American Air Transport in particular. The Board's action, therefore, since it is general in effect, is based on policy considerations, and applies to an entire segment of the industry, which might be considered as a valid legislative rule.

The area between licensing and rule making is indeed nebulous at times.<sup>52</sup>

<sup>48</sup> See *Eastern Airlines v. CAB* 185 F.2d 426 (D.C. Cir. 1950). It was held that exemption applications do not have to follow adjudication procedure.

<sup>49</sup> Ginnane, *Rule Making, Adjudication, and Exemption Under the Administrative Procedure Act*, 95 U. OF PA. L. REV. 621, 623 (1941). "... it must be of future effect—implementing, interpreting or prescribing law or policy."

*Id.* at 632 Rule Making. "1. Agency statement of general applicability, i.e. applicable to all persons in a class, and future effect designed to implement or prescribe law or policy."

Dickinson, *Administrative Justice and the Supremacy of Law* 21 (1927):

"What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual who will be definitely touched by it; while adjudication operates concretely on individuals in their individual capacity."

Fuchs, *Procedure in Administrative Rule Making*, 52 HARV. L. REV. 259, 264-65 (1938):

"Accordingly it is useful to define rule making as the issuance of regulations in the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations. . . ."

*Attorney-General's Manual on the Administrative Procedure Act* 14 (1947):

"Rule-making . . . regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature . . . because it is primarily concerned with policy considerations."

<sup>50</sup> Even though the administrative action may have serious adverse effects to those subject to the rule, there is no requirement for a judicial hearing prior to the effectiveness of the regulation.

*Bowles v. Willingham*, 321 U.S. 503, 519-521 (1944);

*Bi-Metallic Investment Co. v. State Board*, 239 U.S. 441 (1925);

*Pearson v. Walling*, 138 F.2d 655,660 (8th Cir. 1943);

*Pacific Box and Basket Co. v. White*, 296 U.S. 176 (1935).

<sup>51</sup> *Standard Airlines v. Civil Aeronautics Board*, 177 F.2d 18 (D.C. Cir. 1949).

<sup>52</sup> Ginnane, *Rule Making, Adjudication and Exemption Under the Administrative Procedure Act*, 95 U. OF PA. L. REV. 621, 623 (1941). "The definition of 'license' in terms of agency 'approval' or 'permission' obviously overlaps the definition of 'rule' as to the approval or prescription for the future of the specified and illustrative agency function."

There are elements of the rule here which show aspects of both rule making and licensing.<sup>53</sup> The factor which most seems to make this action rule making rather than licensing is that the entire group of irregular carriers is affected. It is not as if a particular carrier is having its operating grant changed; the Board's action here is comparable to legislative amendment which as an incident to it produces changes in the operating authority of those operating under the statute. Here the license is not changed, but the legislative basis for the license is amended. As a legislative rule it may be validly upheld.

There thus seems to be a sound basis for calling the regulation valid either as interpretative or legislative. Fairness to the entire industry would result by placing all the carriers on equal footing.<sup>54</sup> From an equitable approach, therefore, the ruling would produce greater competitive balance in the industry and should be upheld by construing it as legislative in nature.

#### *Summary*

The three principal cases discussed above illustrate some of the tools which the Civil Aeronautics Board has available for carrying out its function of regulating air commerce. These are by no means the exclusive devices available for the Board. However each of them is important in its own peculiar factual situation, and it seems that to the degree that the use of a given procedure will aid the Board in administering the policies of the Civil Aeronautics Act, the courts are willing to allow the Board a very wide range of discretion.

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### DIGEST OF RECENT CASES

#### JURISDICTION TO REGULATE — CONFLICT BETWEEN STATE AND FEDERAL AGENCIES

*United Air Lines v. Public Utilities Commission of California*,  
109 F. Supp. 13 (N.D. Cal. Dec. 3, 1952)

Plaintiff has been providing air service for a number of years between Long Beach, California, and Avalon on the island of Santa Catalina (a part of the State of California) by authority of a certificate of public convenience and necessity issued in 1939 by the Civil Aeronautics Board. A substantial portion of the route lies over the high seas, however, and is thus not over the State of California. In 1951 the California Public Utilities Commission advised plaintiff in writing that they had claimed jurisdiction over this route, and requested the filing of the tariffs covering this service. In an action for declaratory judgment by the airline, a three-judge district court held that since Congress has by statute asserted its supremacy over this area, the state commission has no jurisdiction or power to regulate in any manner the transportation activities of the airline over the route in question.

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<sup>53</sup> Since it diminishes the operating authority of the airline, it could be considered as an amendment to their license. It could be considered a rule as it is of general applicability, has future effect and is based on policy considerations.

<sup>54</sup> Magnusson, *Observations on the Economic Regulations of the Civil Aeronautics Board*, 18 J. AIR L. 181, 189 (1951):

"The purpose of a regulation or an interpretative statement is to inform the industry in detail as to the conduct the Board expects it to follow in those cases in which regulations are authorized. A regulation is a quick method of discharging such a responsibility with equality of treatment to all persons in the same situation."



WRONGFUL DEATH ACTION — NONRESIDENT AIRCRAFT —  
SERVICE OF PROCESS

*Peters v. Robin Airlines,*

118 N.Y.S. 2d 238, 3 Avi. 18,069 (N.Y. Sup. Ct. Dec. 17, 1952)

Passenger who boarded airline in New York City was killed by crash of plane in California mountains. Survivors brought wrongful death action against the airline by service of process on New York Secretary of State, under state statute authorizing this. The airline objected to the validity of the service of process on the grounds that (1) it is not a resident of the state, (2) it is no longer authorized to do business in New York, (3) the accident did not occur in New York. The New York Supreme Court held that the service of process was valid. The statute was construed to apply to any action growing out of the operation within the state of a nonresident aircraft. Thus, even though the airline has ceased operating in New York since the time of the accident, the mere fact that they used an airport within the boundaries of the state of New York makes them subject to service of process for any cause of action arising out of a flight which makes use of such facilities.

ACQUISITION PROCEEDINGS — FAILURE TO EXERCISE  
CERTIFICATE AUTHORIZATION — EFFECT OF SUCH FAILURE  
ON CIVIL AERONAUTICS BOARD IN MERGER PROCEEDINGS

*Delta-Chicago and Southern Merger Case, C.A.B. Docket #5546,*

1A CCH Aviation Law Rep. ¶21,557, 21 U.S.L. Week 2346 (Dec. 24, 1952)

By virtue of section 401(g) of the Civil Aeronautics Act, Congress has granted to the Civil Aeronautics Board the power to declare that certificates authorizing operation of a given route will cease to be effective in cases where the service has never been inaugurated or, after inauguration, has been abandoned for a specific period. Furthermore, this power may be exercised even though the carrier has begun or resumed operations over the particular route. These provisions, plus those of section 401(h) granting to the Board the power to alter, amend, modify, or suspend certificates in whole or in part if the public convenience and necessity so require, allow the Board to dispose of operating rights no longer required by the public convenience and necessity, not only in cases where the rights have never been exercised but also where services are actually being rendered.

In the instant case, an objection was raised as to the power of the Board to transfer dormant authorizations to a new firm created by the merger of an airline with another carrier without allowing an opportunity for a showing of public convenience and necessity. The objection was based on the theory that in comparable situations under the Interstate Commerce Act the ICC has declined such transfers unless there is an affirmative showing that the public convenience and necessity require the continuance of the authorizations. However, the Board held that it would be very unnecessary and illogical to hold that every transfer case involving dormant operating rights should be converted into a proceeding for the retrial of the issues of public convenience and necessity. Not only would such a holding greatly expand the issues in transfer cases and delay the consummation of transfers whose early approval might in all other respects be in the public interest, but in certain cases disapproval of transfer of the unused rights might jeopardize the carrying out of the entire agreement. But the Board did qualify the decision by pointing out that even though they may approve the sale of dormant operating rights, they would not thereby be precluded

from subsequently instituting a proceeding to determine whether that authority should be suspended or terminated.

**DAMAGE CLAIMS — VALIDITY OF AIRLINE PROVISION  
REQUIRING 30 DAYS' WRITTEN NOTICE BEFORE  
SUIT CAN BE FILED — POWER OF CIVIL AERONAUTICS BOARD  
TO DETERMINE PAST VALIDITY OF AIRLINE REGULATION**

*Continental Charters, Inc.*, C.A.B. Docket #5573,

1A CCH Aviation Law Rep. ¶21,562, 21 U.S.L. Week 2360 (Jan. 16, 1953)

Respondent airline had promulgated a tariff provision requiring 30 days' written notice of any damage claims for personal injury or death as a prerequisite to suit thereon. The Board held that such a requirement was unreasonable and therefore unlawful. They felt that all the usual and normal operating practices of the airline with regard to the reporting of accidents provided adequate notice to them of any claims which might be brought, and that therefore such a rule was not reasonably necessary for the airlines' protection. They considered it to be merely "a device which serves to defeat the normal liability of a common carrier."

The carrier also contended that under Sections 1002(d) and (g) of the Civil Aeronautics Act the only authority which the Board has in such cases is to declare the rule inoperative as to the future. However, the Board held that there is nothing in either subsection (g), which empowers them to suspend the operation of a tariff pending the investigation of the lawfulness of the rate, fare, or charge, or in subsection (d), which confers upon the Board certain quasi-legislative powers for the prescribing of rates, fares, or charges where the one filed by the carrier is found to be unreasonable, which prevents them from making an administrative finding of past unlawfulness. They went on to find that the above regulation was not a "just and reasonable classification, rule, regulation, or practice" under Section 404(a), and that they were therefore authorized to issue an appropriate order requiring compliance therewith under Section 1002(c). Obviously, the Board continued, an order operating in the future only would allow the carrier to retain the benefit of its own unlawful rule. Since the Board does not have the facilities to examine every regulation which is submitted to them for reasonableness, it is only by declaring them retroactively unlawful once their attention has been directed to the particular rule that the Board can properly administer the Civil Aeronautics Act in the best public interest.

**WRONGFUL DEATH ACTION — DEATH ON THE HIGH SEAS ACT —  
JURISDICTION OF COURT**

*Sanchez et. al. v. Pan American World Airways, Inc.*,

107 F. Supp. 519, 3 Avi. 18,113 (D.C. Puerto Rico, August 22, 1952)

Action for wrongful death as the result of an airplane crash off the coast of Puerto Rico was brought in the U.S. District Court in Puerto Rico on the grounds of diversity of citizenship and jurisdictional amount. Defendant moved for dismissal on the grounds that the cause of action was governed by the "Death on the High Seas Act," and hence within the Admiralty jurisdiction of the court, and that since the allegations of the complaint do not conform with the Admiralty Rules, they fail to state grounds upon which relief can be granted. The court held that while the *substantive* rights and liabilities of the parties in connection with any claim for damages were governed by the aforementioned statute, this is by no means an exclusive remedy. Rather, the statute should be construed as giving a remedy in

admiralty in addition to and not in place of any other remedy that may exist. The court concluded that while the *substantive rights* and corresponding liabilities of the parties are exclusively governed by the federal statute, said statute does not, in its *remedial* feature, exclude the use of any other applicable *remedial* statutes, federal or local, available for enforcing said substantive rights, but is rather additional thereto.

ANTITRUST LAWS — PRIORITY OF JURISDICTION AS BETWEEN  
COURTS AND CAB — DISTINCTION BETWEEN  
DETERMINATIONS OF THE LAW AND REMEDIES

*Apgar Travel Agency v. International Air Transport Association*,  
107 F. Supp. 706 (D.C. N.Y. October 2, 1952)

Plaintiff ticket agency brought an action for injunction and treble damages under the antitrust laws against defendant air carriers, charging a conspiracy to destroy its business. Defendants moved to dismiss the complaint on the grounds that it alleged matters which are within the primary jurisdiction of the Civil Aeronautics Board, and that hence the District Court lacks jurisdiction in the absence of preliminary resort to the Board. The court granted the motion, but retained jurisdiction to grant remedies after Board action. In doing so they noted the conflict between *S.S.W., Inc. v. Air Transport Association*, 191 F.2d 658 (D.C. Cir. 1951), and *Slick Airways v. American Airlines*, 107 F. Supp. 199 (D.C. N.J. 1952). The court felt that it made little difference that plaintiff was only a ticket agency and not an airline, for the action nevertheless "directly involves the economic conduct of air carriers" and is hence within the jurisdiction of the Civil Aeronautics Board. The court noted that the Board has authority to exempt agreements between carriers from the antitrust laws as an aid to its regulatory powers, and felt that in a case such as this the administrative agency should have priority of jurisdiction. But the court noted that even though the Civil Aeronautics Act should be allowed to supercede the antitrust laws as to priority of jurisdiction, the statutes are not in conflict as to remedies since the Aeronautics Act makes no provisions for damages in such a case. They therefore retained jurisdiction over the proceedings so that they could consider the damage question at the conclusion of the Board's determinations.

AIRSPACE RESERVATIONS — VALIDITY OF EXECUTIVE  
ORDER CREATING THEM — DEVICES FOR GOVERNMENTAL  
PRESERVATION OF NATURAL RESOURCES

*United States v. Perko et. al.*,  
108 F. Supp. 315 (D.C. Minn. September 26, 1952)

Executive Order No. 10092 created certain airspace reservations under the jurisdiction of the Secretary of Agriculture. Defendants operate resorts and provide air service for these resorts within the designated area. They have repeatedly violated the Executive Order, and the United States has filed suit to enjoin these violations. Defendants contest the validity of the order. The District Court found such regulations to be in furtherance of the policy of the Government of preserving the natural resources of the forest area, and as such was valid. They felt that the provisions of the Civil Aeronautics Act which provide for "a public right of freedom of transit in air commerce through the navigable air space of the United States" must be subject to the paramount right of the Government to promulgate air regulations and air bans under its exclusive sovereignty in air space. The court expressed no opinion as to the rights of the parties, if any, due to the diminution of value of their resorts because of the air ban. They merely recognized the validity of the Order and the regulations thereunder, and granted the injunction prayed for.